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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 5, Original

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE STATE OF CALIFORNIA, *Defendant*.

BRIEF OF AMICUS CURIAE STATE OF ALASKA

In Regard to the Report of the Special Master

INTRODUCTION

The significance of the litigation between the State of California and the United States obviously extends far past the interest of the litigants themselves. This case poses, for the first time, specific questions relating to the establishment of state boundaries. What the Court decides here will establish principles which will affect every other coastal state in the Union.

The State of Alaska has a particular interest in the litigation. Alaska is presently engaged in litigation with the United States as to the ownership of lands

underlying waters within a coastal indentation of Alaska termed Yakutat Bay.[1] The basic question in that case is whether a portion of Yakutat Bay, deemed by Alaska to be inland waters of the State, are in fact inland, or, as the Government contends, outside of the State's maritime boundary. As a natural corollary to the basic issue, the State and the Federal Government are in dispute over the measurement of the three mile marginal belt, which inferentially defines the extent of lands granted to the State by the Submerged Lands Act, Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. §§ 1301-1315. The marginal belt, according to the Act, is measured from the "seaward limits of inland waters"—"limits" which are very much in dispute.

Issues identical to those raised in *United States* v. *State of Alaska*, *supra*, are presently before this Court. A determination of the extent of California's ownership of the lands underlying the waters of Monterey Bay on the California coast will, for all practical purposes, determine the outcome of the litigation between Alaska and the United States.

It is for this reason that the State of Alaska submits this Brief. As the State's interest is limited, its Brief will be similarly limited to the particular phase of the case which deals with the validity of California's claim to lands underlying the waters of Monterey Bay. This question occupies but a fraction of the briefs of California and the United States. To Alaska, however, the issue is one of crucial significance, and since the issue is to be determined, Alaska desires to have its views before the Court.

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[1] *United States* v. *State of Alaska*, Civ. A-51-63, United States District Court, District of Alaska.

SUMMARY OF ARGUMENT

The Report of the Special Master defined inland waters within bays on the California coast by reference to the so-called ten mile rule. According to this rule, waters within bays are defined as inland waters if they lie landward of a line drawn between headlands in a bay at the first point where those headlands do not exceed ten miles in width.

The Special Master's conclusion stemmed from the assumption that inland waters of the State of California are defined in accordance with the policy of the Executive Branch of the United States Government in its dealings with foreign nations. Since the Special Master concluded that Executive policy at the time of this Court's decree in *United States* v. *California*, 332 U.S. 19 (1947), defined inland waters by reference to the ten mile rule, he applied it in the hearings before him. Application of the ten mile rule to Monterey Bay, an indentation which is approximately 19.24 miles in width at the mouth, resulted in a definition of only a portion of the Bay as inland waters.

Since the Report of the Special Master, two significant events have occurred. First, Congress adopted the Submerged Lands Act, granting to all coastal states lands underlying a three mile marginal belt measured seaward of the outermost limits of inland waters. Second, the policy of the Executive Branch of Government in regard to inland waters has changed. That policy now proclaims that all waters landward of a twenty-four mile closing line in bays are inland waters of the United States.

The State of Alaska believes, with the United States, that the passage of the Submerged Lands Act did not

change the basic nature of the issues in this case. Prior to the Act, the accurate determination of inland waters was necessitated by the fact that, under this Court's holding in *United States* v. *California, supra,* the seaward limits of inland waters marked the extent of state ownership of lands beneath coastal waters. The Submerged Lands Act, while extending state ownership three miles seaward, measured the grant from the "seaward limit of inland waters." While the quantum of ownership which will result from a determination of the seaward limit of inland waters has, therefore, changed, the necessity for a clear definition of the term has not.

Both parties to this litigation have sought the definition of inland waters from the terms and legislative history of the Submerged Lands Act. Such an analysis tends to confuse the real principles which govern the definition of "inland waters." The inland waters of a state are not defined by the Submerged Lands Act, but by the state's Congressionally approved boundaries. As title to land underlying inland waters is vested in the state following its admission, title cannot subsequently be affected by Congressional action.

The Submerged Lands Act, it is true, does establish a definition of inland waters. That definition, however, has two clearly defined purposes. First, the definition inferentially limits the Congressional grant of lands underlying the marginal sea. Second, the Act provides a prospective Congressional approval for the establishment of state boundaries. Such an approval was necessitated by the fact that, prior to the passage of the Act, few states had actually established clearly defined water boundaries. Neither of these purposes

indicate a Congressional intent to affect the definition of inland waters within previously established state boundaries.

In theory, therefore, a state's inland waters, as defined in an Act of Admission, might be different than its inland waters as defined by the Submerged Lands Act. In this case, however, as we shall show, the definitions in both Acts are identical.

California's Act of Admission, Act of September 9, 1850, 9 Stat. 452, as approved by Congress, measured the State's boundaries three miles seaward from the coast, and included within those boundaries all "bays." The Submerged Lands Act, while making no specific reference to "bays", speaks of the "seaward limit of inland waters", a term which Congress clearly meant to include at least certain waters within bays. There is no concrete definition of a "bay" in either Act.

In an effort to arrive at an interpretation of "inland waters" in general and "bays" in particular, the United States argues that since a state's boundaries cannot exceed the boundaries of the Nation, and the latter are set by Executive policy, the former must be governed by the same policy. While a state's boundaries unquestionably do not exceed those of the Nation, the rest of the Government's argument is wholly unsupportable. While the Executive Branch of Government has the authority to limit the exercise of rights within State and Federal boundaries, it does not have the authority to set those boundaries. The boundaries are set exclusively by Congress, and in establishing those boundaries, Congress is presumed to act in accordance with the law of nations. The real question, therefore, in interpreting either California's Act of Admission

or the Submerged Lands Act, is the meaning of inland waters within bays, as those waters are defined by international law.

Until 1958, 100 years after California's admission and five years after the adoption of the Submerged Lands Act, there was no clear-cut concensus between nations as to a means by which inland waters of any nation within bays, could be defined. International law recognized certain basic criteria of relationship between land and water area which could be used to test a nation's claim to inland waters, but did not recognize an objective test for measurement. In 1958, however, it became settled that inland waters in bays include *at least* waters landward of a twenty-four mile closing line within bays. The twenty-four mile "rule" constituted a reduction of long existent subjective standards to objective criteria. The rule is interpretive in nature, expressing the objective equivalent of prior subjective measurements rather than modifying the measurements themselves.

The incorporation of principles of international law defining inland waters in California's Act of Admission follows from the presumption that Acts establishing boundaries are interpreted consistently with international law. Utilization of the twenty-four mile rule in interpreting those principles in reference to a particular bay stems from the fact that the twenty-four mile rule is the present and settled interpretation of the incorporated principles. Since Monterey Bay is less than twenty-four miles in width at its mouth, all of the waters of the Bay are inland and are included within the boundaries of the State of California.

Incorporation of the twenty-four mile rule into the Submerged Lands Act stems from the same general

rule of interpretation. The legislative history of the Act makes it clear that Congress was not seeking a definition of inland waters within bays independent of international law for the purposes of the Act. The action was a conscious one, in recognition of the fact that no clear-cut objective measurement of inland waters had, as yet, evolved. In refusing to specify a definition in objective terms, Congress must be deemed to have adopted the principles of international law presently expressed by the twenty-four mile rule. Since Monterey Bay is less than twenty-four miles in width at the mouth, all waters within the Bay are inland within the meaning of the Submerged Lands Act, and the three mile marginal belt is measured from a line across the mouth of the Bay.

ARGUMENT

I.

THE QUESTION OF CALIFORNIA'S BOUNDARIES, EITHER AS DEFINED IN THE ACT OF ADMISSION OR IN THE SUBMERGED LANDS ACT, IS NOT DETERMINED BY DECLARATIONS OF THE EXECUTIVE BRANCH OF THE UNITED STATES GOVERNMENT.

Much of the United States' argument in this case is devoted to the contention that the contemporary Executive policy of the United States, relating to the definition of inland waters within bays, is the only relevant source of interpretation of a Congressional Act, which utilizes the term "inland waters" without specifying an independent definition. While the proper framework of interpretation will shortly be discussed, we shall show at the outset that the interpretive criteria suggested by the United States are completely irrelevant to an interpretation of either California's Act of Admission or the Submerged Lands Act.

The boundary of the State of California extends three miles into the Pacific Ocean from "harbors and bays along and adjacent to the Pacific Coast." Article XII, California Constitution, 1849. The term "bays" is not specifically defined. Congress accepted all provisions of the California Constitution in passing the Act of Admission. No independent federal definition of California's boundaries was attempted.

There is no longer the slightest doubt that Executive policy on boundary limitations is irrelevant to an interpretation of California's Act of Admission. While United States foreign policy may well dictate a restriction of rights within an established state or national boundary, the Executive Branch is without authority to establish that boundary. The power to establish state boundaries rests exclusively within the Congress. Thus, in *United States* v. *Louisiana, et al,* 363 U.S. 1 (1960), this Court rejected the theory that the policy of the Executive Branch, which defined the territorial sea as extending three miles from the coast of the United States, necessarily limited the boundaries of states to that figure. The delineation between Executive and Congressional authority was clearly expressed by this Court:

> "The power to admit new states resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations." Id. at 35.

In a similar vein, this Court noted:

> "It may indeed be that the Executive, in the exercise of its power, can limit the enjoyment of certain incidents of a Congressionally conferred boundary, but it does not fix that boundary." Id. at 51.

Faced with the flat rejection of its argument in *United States* v. *Louisiana, supra,* the United States has modified that argument slightly for this case. Rather than focusing on the terms of the Act of Admission, the Government argues that the interpretation of the Submerged Lands Act, and specifically, of the term "inland waters" therein, is controlled by Executive policy defining inland waters at the date the Submerged Lands Act was adopted.

Initially, we note that the Government's argument attempts to make a distinction without a difference. Section 4 of the Submerged Lands Act has the clearly expressed purpose of confirming maritime boundaries for those coastal states which had not previously established such boundaries. Boundaries, under Sec. 4, run three miles from the "coast line". The definition of the term "coast line" is found in Sec. 2(b) and involves a determination of the "seaward limit of inland waters". The definition will obviously determine the location of the newly established boundaries under the Act. If, therefore, Executive policy is irrelevant in determining the extent of a Congressionally established boundary, it is irrelevant in interpreting the terms of the Submerged Lands Act.

More important, however, the United States' attempt to read definitions dictated by foreign policy into the terms of the Submerged Lands Act ignores the reasoning which dominated this Court's opinion in *United*

States v. *Louisiana, supra.* It may be true that when Congress acts in an area which affects the foreign policy of the United States, a Congressional Act which fails to specifically negate a previous Executive definition may be taken to incorporate that definition within the Act. *In re Cooper,* 143 U.S. 472 (1892). The Submerged Lands Act, however, in no way involves the foreign affairs of the United States. It involves a purely domestic division of off-shore resources between the Federal Government and the states. As this Court noted:

> ". . . [T]he boundaries contemplated by the Submerged Lands Act are those fixed by virtue of Congressional power to admit new states and to define the extent of their territory, not by virtue of the Executive power to determine this country's obligations vis-a-vis foreign nations." *United States* v. *Louisiana, supra,* at 51.

Since the Submerged Lands Act in no way involves the foreign policy of the United States, the policy of the State Department is of no more consequence in interpreting the terms of that Act than is the policy of any other department of government. Concurrently, there is no reason to assume that Congress adopted a policy used in foreign affairs for purely domestic purposes. Indeed, Congress went out of its way to avoid just such an incorporation. Originally, Sec. 2(b), S.J. Res. 13, 83d Cong., 1st Sess. (1953), which eventually became Sec. 2(c) of the Submerged Lands Act,[2] provided:

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[2] Though the law, as approved, is H.R. 4198, all but the title to the introduced bill was stricken and S. J. Res. 13, 83d Cong., 1st Sess. (1953) was substituted. The substituted form is that which was enacted into law.

> "(b) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, *which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea; . . .*" (Emphasis added)

The Senate Committee on Interior and Insular Affairs, before whom hearings on the bill were held, requested a State Department analysis of the boundary questions raised by the legislation. In response to the invitation, the Department presented extensive testimony regarding the United States' definition of inland waters and the possible effects of the Congressional adoption of a different standard. Testimony of Deputy Legal Adviser of the Department of State, Mr. Tate. *Hearings before the Committee on Interior and Insular Affairs,* U.S. Sen., 1st Sess., on S.J. Res. 13, pp. 1051-1088. The State Department representative made it clear that the ten mile rule was firmly established as an Executive definition of inland waters within bays. Id. at 1052-1058.

The response of the Committee to the testimony offered by the Department of State was to strike all language of Sec. 2(b) of S.J. Res. 13 following the words "inland waters", leaving the term without qualification. The Committee explained its action in these words:

> "The words 'which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea' have been deleted from the reported bill because of the committee's belief that the question of what constitutes inland waters should

be left where Congress finds it. The committee is convinced that the definition neither adds nor takes away anything a State may have now in the way of a coast and the lands underneath waters behind it.

"In this connection, however, the committee states categorically that the deletion of the quoted language in no way constitutes an indication that the so-called 'Boggs Formula,' the rule limiting bays to areas whose headlands are not more than 10 miles apart, or the artificial 'arcs of circles' method is or should be the policy of the United States in delimiting inland waters or defining coast lines. The elimination of the language, in the committee's opinion, is consistent with the philosophy of the Holland bill to place the States in the position in which both they and the Federal Government thought they were for more than a century and a half, and not to create any situations with respect thereto." United States Code and Administrative News, 83d Cong., 1st Sess., p. 1493[12], 1953.

The words stricken by Committee action were never restored to the bill before passage.

Congress was certainly free, if it desired, to define the inland waters of a state by reference to some maximum limitation on closing lines for bays. It not only failed to do so, but specifically rejected the ten mile limitation rule utilized by the Executive Branch of Government.

In rejecting the incorporation of Executive policy, Congress made no effort to clearly specify an alternative means of interpretation. In the words of the Senate Committee previously quoted, the inland water question was to be left "where Congress finds it."

Thee Act was not intended to add or take away "anything a State may have now in the way of a coast." Analysis of the debate in Congress leads to the identical conclusion regarding the inland water question.[3]

The crux of this case, therefore, is the determination of the extent of the inland waters of California within bays at the time Congress adopted the Submerged Lands Act and the manner in which those waters were defined. Whatever inland waters California possessed prior to the Submerged Lands Act were not changed by the Act.

We now show that the source of definition of the inland waters of California at the time of the Submerged Lands Act, *or any other time;* is international law; that the principles of international law which defined the inland waters of California at the time of the State's admission were the same principles incorporated into the Submerged Lands Act, and that these principles efine inland waters in bays for both Acts in accordance with a twenty-four mile closing line.

II.

THE BOUNDARY OF CALIFORNIA WAS AND IS PRESCRIBED BY INTERNATIONAL LAW

Prior to California's admission to the Union, there was no national boundary on the West Coast. After the admission the United States added to its territory all California lands, together with the inland waters of the new state. While Federal authority did create a three mile belt seaward of the new state, it has never

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[3] See 99 Cong. Rec. 4108 (1953) (Sen. Cordon); 99 Cong. Rec. 4112 (1953) (Sen. David); 99 Cong. Rec. 4460 (Sen. Butler); 99 Cong. Rec. 2620, 2694 (Sen. Cordon); 99 Cong. Rec. 4361 (Sen. Holland).

been suggested that, at the time of admission, the *inland* waters of the United States exceeded those of the state.[4] At the same time, since the seaward limit of California's inland waters was also the boundary of the United States, the Act of Congress admitting California must be recognized as an Act establishing the national boundary. In interpreting California's Act of Admission, therefore, it is proper to use the same interpretive aids as were and are proper in ascertaining the boundary of the United States.

In an earlier brief in this proceeding, the United States made a simple statement of what we believe to be the principles which correctly define the boundary of the Nation. The Government stated:

> "Now the United States certainly has a maritime boundary located somewhere. Certainly, it must embrace whatever minimum area is universally conceded by international law to all maritime nations." *United States* v. *California*, No. 6, Original, Reply Brief of the United States before the Special Master, June 1952, at p. 3.

There is no necessity to rely on the United States itself in support of the proposition that the boundaries of the Nation are defined by international law. The United States' argument was but a particular recognition of the general incorporation of international law as a part of the law of the United States. Thus, in

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[4] Traditionally, states have owned lands under all coastal inland waters. *Pollard* v. *Hagan*, 3 How. 212 (1845); *Shively* v. *Bowlby*, 152 U.S. 1 (1894). It is significant to note that if the United States prevails in this case, at least in regard to Monterey Bay, an entirely new type of inland waters will be created. All waters landward of a ten mile closing line in bays will be inland waters of a state; waters seaward of the ten mile limit, but landward of a twenty-four mile line, will be inland waters of the United States, but outside of state boundaries.

The Paquette Habana, 175 U.S. 677, 700 (1900), this Court stated:

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat."

Similarly, in *The Over the Top*, (D.C. Conn. 1925) 5 F.2d 838, the Court stated:

> "If, however, the court has no option to refuse the enforcement of legislation in contravention of principles of international law, it does not follow that in construing the terms and provisions of a statute it may not assume that such principles were on the national conscience and that the congressional act did not deliberately intend to infringe them. In other words, unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it. . . ." At p. 842.

The incorporation of international law into the domestic law of the United States has been recognized in a whole variety of circumstances. See *Kansas* v. *Colorado*, 185 U.S. 125, 146-7 (1902); *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907); *Cook* v. *United States* (The Mazel Tov), 288 U.S. 102 (1933); *The Lusitania* (S.D.N.Y. 1918) 251 Fed. 715, 732; *Peters* v. *McKay*

(Ore. 1952) 238 P.2d 225. Of particular relevance here is the recognition of that incorporation in connection with the interpretation of a Congressional Act establishing the boundaries of a state. *Louisiana* v. *Mississippi*, 202 U.S. 1 (1905), is precisely on point. In ascertaining the Congressionally established boundaries of the two states, this Court relied upon international principles of boundary measurement, and specifically approved the application of those principles ". . . in respect to water boundaries, to sounds, bays, straits, gulfs, estuaries, and other arms of the sea." *Louisiana* v. *Mississippi, supra.*[5]

Of similar significance is this Court's holding in *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891), where the Court, in determining the extent of inland waters of Massachusetts, utilized doctrines of international law. In the Court's words:

> "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; . . ."[6] At p. 258.

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[5] One of the points at issue in the dispute was the location of the boundary line in the Mississippi River where it flowed into the Gulf of Mexico. In ascertaining the line, the Supreme Court utilized the international doctrine of "Thalweg" which traces the boundary in accordance with the deep water channel of the river. See OPPENHEIM, INTERNATIONAL LAW, Vol. 1, pp. 254, 255.

[6] The Court's holding in *Manchester* is particularly significant for the standards which were *not* used in interpreting the extent of inland waters. While the Executive Branch of the United States Government had a clearly defined policy dating from 1888 that inland waters within bays were defined by a ten mile closing line (see U.S. Br. 82, 85), the Court relied *not* on that policy, but upon principles of the law of nations.

Because of our reference to international law as an interpretive aid, it may be well to point out the sources of that law. These sources are usually recognized as international custom, treaties and conventions, decisions of courts and international tribunals and writings of highly qualified publicists. OPPENHEIM, INTERNATIONAL LAW §§ 15-19 (5th Ed. 1937); and see THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 38 (1945).

Recognition that international law establishes the boundaries of the United States, and inferentially of coastal states, poses rather than determines the issues of this case. The real crux of the problem is ascertaining the manner in which inland waters within bays are defined under international law. For that reason, the State now turns to an examination of the development of international law on this subject, both with reference to the date of California's admission, the date of the Submerged Lands Act, and the present.

III.

INLAND WATERS IN BAYS ARE WATERS WHICH BEAR A CLOSE NEXUS TO A COASTAL STATE AND ARE PRESENTLY DEFINED IN ACCORDANCE WITH THE TWENTY-FOUR MILE RULE.

A. *Development of the inland waters doctrine in international law.* When the coastline of a state is straight, it is generally recognized that the marginal sea is measured from the low-water mark on the shore.[7]

[7] Letter of Secretary of State Bayard to Secretary of the Treasury Manning, May 28, 1886, 1 MOORE, DIGEST OF INTERNATIONAL LAW 718-721 (1906); *Borax Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935); *United States* v. *California*, 332 U.S. 804 (1947). But see 1 KENT, COMMENTARIES OF AMERICAN LAW 30 (1832), where the author advocates measurement of the marginal sea of the United States from straight lines drawn between distant headlands, "as for instance, from Cape Ann to Cape Cod." Kent's views are cited approvingly in *The Kodiak* (D.C. Alaska 1892) 53 Fed. 126.

The manner of measurement on an indented coastline, however, is far less obvious. Early writers were quick to recognize that measurement of the territorial sea from the mean low tide mark of the shore of a bay would not do justice to a coastal state's legitimate interest over the indentation. However, while recognizing that a line might be drawn from headland to headland across the bay, the publicists were, in the abstract, unable to agree either on the location of the line, its maximum length, or the character of waters on either side of the line.[8]

As nations came to recognize that "inland" waters within indentations were as fully subject to a coastal nation's jurisdiction as the land mass surrounding the indentation, the importance of establishing a precise definition of the extent of inland water increased. In the context of recognized bays, the sought criteria was an established limitation on the length of the baseline separating inland and territorial waters within the bay.

The earliest numerical formulation was the most obvious. Since three miles was the normally accepted width of the territorial sea, and since an opening six miles in width was already subject to control by a coastal state surrounding the indentation, it was argued that a line six miles in length was proper for separation of inland and territorial waters within

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[8] The writings of Hall and Despagnet, reprinted in CROCKER, THE EXTENT OF THE MARGINAL SEA, Government Printing Office (1919), indicate the authors' views that a baseline in bays represented the *outer* rather than the inner limit of the marginal sea. This view was soon discarded. See JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, p. 475 (1927).

bays.[9] COLOMBOS, INTERNATIONAL LAW OF THE SEA, p. 152 (4th Ed. 1959).

The six mile limitation, while reasonable in theory, never gained general acceptance as a rule of international law. Certain nations, for reasons of convenience, insisted that an opening of ten miles could validly be enclosed by a baseline.[10] A leading group of international experts were willing to concede the validity of a twelve mile closing line. SCOTT, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW, 114 (1916). While seeking a precise definition of inland waters, nations were equally as anxious to disregard any mathematical criteria when it suited their advantage to do so. *The Direct United States Cable Co., Ltd.* v. *The Anglo American Telegraph Co.*, 2 App. Cas. 394 (1877) (Conception Bay—20-mile line); *The Alleghenian, Stetson* v. *United States*, 4 MOORE, INTERNATIONAL ARBITRATIONS, 4332 (1898) (Chesapeake Bay); 1 Op. Atty. Gen. 33 (1793) (Delaware Bay).

While no one accepted rule of limitation arose during this formative period, there can be little doubt that the ten mile limitation became the majority rule. The origin of the ten mile figure is normally traced to an 1893 treaty between England and France. CROCKER, THE EXTENT OF THE MARGINAL SEA, *supra*. Subsequent international compacts adopted the limitation, often verbatim.[11] In years of continually expanding national assertions of jurisdiction over waters, the ten

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[9] The six mile rule has been referred to by the Supreme Court as "the minimum limit of the territorial jurisdiction of a nation over tidewaters. . . ." *Manchester* v. *Massachusetts, supra.*

[10] See writings of Latour, Bonfila and DeLaprodelle, reprinted in CROCKER, THE EXTENT OF THE MARGINAL SEA, *supra.*

[11] A review of Treaties adopting the ten mile rule may be found in COLOMBOS, *supra*, pp. 152, 153.

mile rule came to represent the rallying point of maritime nations committed to the principle of freedom of the seas. Since those maritime nations represented the majority of the world's naval interest, the ten mile rule, for a time, appeared to gain the character of a true rule of international law.

The first test of the existence of any established rule of international law defining inland waters arose in the *North Atlantic Coast Fisheries Arbitration.*[12] U.S. Sen. Doc. #870, 61st Cong., 3d Sess. The question for the tribunal was the proper interpretation of an 1818 treaty between the United States and Great Britain which prohibited United States fishermen from fishing within three marine miles of any ". . . bays, creeks or harbors of His Britanic Majesty's dominions in America. . . ." The British Government contended that the term "bays" referred to all indentations, regardless of the distance between headlands at their mouth. The United States argued that under international law, "bays" only meant small indentations, and that the maximum length of a closing line between headlands in a bay was six miles.

The Tribunal rejected any six, ten, or twelve mile rule as arising "out of international acts" and "relating to coasts of a different configuration and conditions of a different character." Instead, the Tribunal couched its understanding of applicable principles in general terms, holding that:

> "In the case of bays, the three marine miles are to be measured from a straight line drawn across

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[12] The Arbitration was held at The Hague in 1910. The opinion of the Tribunal is reprinted in CROCKER, THE EXTENT OF THE MARGINAL SEA, *supra*. The most comprehensive analysis of the proceeding is found in JESSUP, THE LAW OF TERRITORAL WATERS AND MARITIME JURISDICTION, *supra*, p. 363 f.f.

> the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast." JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, *supra,* at p. 377.

While the Tribunal refused to recognize an accepted rule of international law mathematically delimiting the size of bays, it was willing to concede that its general statement of principle was "not entirely satisfactory as to its practical applicability." Therefore, the Tribunal suggested that both parties agree that, with certain exceptions, the baseline in bays should be drawn at the first point therein "where the width does not exceed ten miles." Ibid. p. 377. The result of the decision, therefore, was a rejection of the ten mile rule as a principle of international law, and a concurrent adoption of the rule as a matter of practicality.

Faced with the statement of the Tribunal that there was no established rule of international law limiting the length of baselines in bays, and the subsequent failure of The Hague Conference on the Law of the Sea[13] to arrive at any significant agreement on the issue, the international applicability of the ten mile rule was, at best, in doubt. What doubt remained was removed by the International Court of Justice in *United Kingdom* v. *Norway,* I.C.J. Rep. (1951). The

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[13] The 1930 Hague Conference was called to consider the codification of various branches of international law, including the law of the sea. The draft convention which provided the basis of discussion at the conference is printed in a special supplement to Vol. 23 of the American Journal of International Law (1929). Neither the draft nor any substitute convention was adopted at the conference. United States proposals in regard to bays, together with French proposals on the same subject are reprinted in LEAGUE OF NATIONS DOCUMENT, C.351(b), M.145(b), 1930, V, pp. 195-197.

issue before the Court was the validity of Norwegian claims to vast water areas abutting the Norweigan coast as inland waters. Great Britain, faced with a loss of valuable fishing rights, argued that baselines drawn across fjords and bays were limited to a maximum length of ten miles. The Court rejected the British argument, holding that:

> "... although the ten-mile rule has been accepted by certain states both in their national law and in their territories and conventions, and although certain arbitrational decisions have applied as between those states, other states have accepted a different limit. Consequently the ten-mile rule has not acquired the authority of a general rule of international law." *United Kingdom* v. *Norway,* I.C.J. Reports, p. 131 (1951).

The International Court's rejection of the ten mile rule, at a time when many nations of the world were asserting substantial claims over coastal waters, set the stage for debate on the question at the First Law of the Sea Conference convened at Geneva in 1958.[14]

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[14] The Conference was convened pursuant to Resolution of the United Nations General Assembly. Official Records, United Nations General Assembly, 11th Sess., Supp. No. 17 (A/3572) which stated that the General Assembly:

> "Decides, in accordance with the recommendation contained in paragraph 28 of the report of the International Law Commission covering the works of its eighth session that an international conference of plenipotentiaries, should be convoked to examine the law of the sea taking account not only of the legal, but also of the technical, biological, economical and political aspects of the problem, and to embody its work in one or more international conventions or such other instruments as it may deem appropriate."

Eighty-six nations and over 700 delegates attended the Conference. A review of their work is found in JESSUP, "The United Nations Conference on the Law of the Sea, 59 COL. L. REV. 234 (1959).

The Conference was the first serious attempt to establish a codification of the law of the sea since the International Conference at The Hague in 1930. While, like its predecessor, the Geneva Conference was unable to resolve the key question of the maximum width of the territorial sea,[15] it did succeed in establishing, for all intents and purposes, a rule of international law as to the maximum length of baselines between headlands in bays from which the marginal belt is to be measured.

Though the *Fisheries* case apparently destroyed the possibility of the Convention adopting the ten mile rule, the majority at Geneva agreed that some limitation on the line was necessary.[16] That agreement is reflected in Article 7 of the adopted Convention on the Territorial Sea and Contiguous Zone which provides that where the distance between the low water marks of natural entrance points of the bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible

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[15] A second conference, convened in Geneva on March 17, 1960, was also unable to reach agreement on this matter. See SHALOWITZ, SHORE AND SEA BOUNDARIES, Vol. 1, p. 269 f.f. (1962).

[16] The draft articles prepared for the Convention by the International Law Commission originally incorporated a closing line of twenty-five miles. When the proposal met with a cool reception by some states, the Commission reduced the line to fifteen miles, in preference to a lesser length. 1956 I.L.C. Yearbook I, 190-193, 195-197.

within a line of that length. Waters landward of the line are inland waters of the coastal nation.[17]

Article 29 of the Convention requires the ratification of twenty-two states prior to the Convention's becoming operative. However, in the view of the present United States Secretary of State:

> "It [the 24 mile rule] must be regarded in view of its adoption by a large majority of the states of

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[17] The full text of Article 7 is as follows:

"1. This article relates only to bays the coasts of which belong to a single State.

"2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

"3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

"4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

"5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

"6. The foregoing provisions shall not apply to so-called 'historic' bays, or in any case where the straight baseline system provided for in article 4 is applied."

the world as the best evidence of international law on the subject at the present time." Letter from Dean Rusk to Attorney General Kennedy, January 15, 1963, II INTERNATIONAL LEGAL MATERIALS, No. 3, p. 527, May, 1963.

The Secretary's statement is, of course, consistent with the underlying theories of international law. It has long been recognized that a rule of international law may become established by acquiescence and agreement of nations long before any nation is bound by treaty to observe the rule. JESSUP, "The United Nations Conference on the Law of the Sea", *supra,* at p. 264. There is, therefore, a presently established rule of international law which clearly defines the extent of the inland waters of a nation. That rule recognizes that all bays which may be enclosed by a twenty-four mile closing line are inland bays of the coastal nation.

B. *The nature of the twenty-four mile rule.* There is an obvious tendency, in reviewing various baseline "rules", to define inland waters purely by reference to those mathematical limitations. Inland waters, however, never have been defined in such simple terms. The twenty-four mile rule did not become established until 1958. Yet, inland waters obviously were recognized in international law before that date and the principles of recognition were equally established. It is only through reference to those principles that the nature of the twenty-four mile rule, or for that matter the multitude of proposals which preceded it, can be fully understood.

The basic criteria through which inland waters are and have been defined are criteria of relationship. International law recognizes that a nation has exclusive authority over those waters which bear a sufficiently

close nexus to the nation to justify the exercise of such authority. The predominant characteristic of inland waters is "an especially intense concentration of both inclusive and exclusive interests." McDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS, p. 89 (1962).

The "interests" which justify a nation's claim over inland waters have found more explicit formulation in two significant international determinations. The initial analysis was that of the Tribunal of the North Atlantic Fisheries Arbitration. In refusing to apply the artificial ten mile rule as a limitation on the term "bays" as the term was used in a Treaty of 1812, the Tribunal wrote:

> "Now, considering that the treaty used the general term 'bays' without qualification, the Tribunal is of opinion that these words of the treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing, . . .
>
> ". . . The negotiators of the treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of 'bays'; they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which, for any one of the different bays, are to be appreciated; the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is intended; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in gen-

eral." *North Atlantic Coast Fisheries Arbitration, supra,* 92, 97.

Forty years later the definition of inland waters was still framed in the same terms of relation. In the *Fisheries* case, the International Court of Justice, rejecting the argument of the United Kingdom that inland waters were defined by the ten mile baseline rule, noted:

> "It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law * * *
>
> "In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.
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> "Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. * * *
>
> "Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. * * *
>
> "Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage." *United Kingdom* v. *Norway, supra,* at 132-134.

The issue in the *Fisheries* case was the validity of Norwegian baselines defining inland waters. In the Court's words, factors of relationship could be used by Norway "to justify the way in which it applies the general law." The Court viewed the Norwegian system of baselines as a translation of the general principles which define inland waters into concrete terms. Upon consideration, the Court found the translation valid.

With the concept of the "general law" firmly in mind, the meaning of six, ten and twenty-four baselines becomes clear. Each represents an attempt, for practical purposes, to equate the "general law" to a precise mathematical formula. The mathematical equivalent has changed with time, but it has always been tied to the basic principles which define inland waters. The six mile limitation was the creature of the "canon shot philosophy"—a belief that since canons could cover a range of only three miles, an opening of six miles in width was the maximum water area which could actually be controlled by a coastal state. See Letter of Secretary Buchanan to Mr. Jordan, 1 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 705. As it became obvious that a limitation predicated on this method of "control" was out-moded, the six mile rule became out-moded as well. The ten mile rule suffered from the same defect. It became out-moded as the understanding of the interests of a nation over adjoining waters, together with the nature of "control", became modified.

At the time of the Geneva Conference, there was no settled practice for the delimitation of inland waters within bays. Several nations advanced claims, felt by the United States and other countries to be extrava-

gant.[18] The twenty-four mile rule, which is the product of the Conference, represents a compromise by those countries on the interpretation of principles recognized by all of them.

The twenty-four mile rule now stands as an accepted interpretation of the principles defining inland waters within bays. Since the rule is interpretive rather than definitive, it is entirely conceivable that sometime in the future, modifications may occur. Indeed, it is conceivable that at some time, the "general law" in itself may be modified. For the present, however, it is sufficient to note that no proposed baseline rule, including the present twenty-four mile rule, has sought or achieved any such modification of the principles upon which they are based.

IV.

CALIFORNIA'S INLAND WATERS AS DEFINED IN THE ACT OF ADMISSION AND THE SUBMERGED LANDS ACT INTERPRETED CONSISTENTLY WITH PRINCIPLES OF INTERNATIONAL LAW INCLUDE ALL BAYS WHICH MAY BE ENCLOSED BY A TWENTY-FOUR MILE LINE.

With the previous analysis of the development and nature of principles of international law relating to bays, it is now relevant to set forth an interpretation of the California Act of Admission and the Submerged Lands Act, insofar as those Acts define the inland waters of the State of California within bays. According to the Act of Admission, the California boundary runs three miles seaward of all "bays". The Submerged Lands Act measures the Congressional grant of lands from "the seaward limit of inland waters."

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[18] United States support for the proposal is analyzed in Hearings before the Committee on Foreign Relations on Executives J to N, Incl., 86th Cong., 2d Sess. 92.

Both Acts require a determination of the maximum extent of inland waters within bays.

We have previously shown that both Acts, relating as they do to the boundaries of states, should be interpreted consistently with doctrines of international law. On the surface, such an interpretation appears extremely complex. If, for instance, we seek to apply the principles of international law relating to bays as they existed during the middle of the 19th century, the time of California's admission, to the Act of Admission, the results would be highly conjectural. There was no objective measurement for bays established in international law until 1958. The only principles of law applicable to an act antedating the Geneva Conference would be the general principles by which inland waters were delimited, as those principles were espoused by the International Court of Justice, publicists, and other sources of international law. This Court would be faced with the difficult task of applying to the Act of Admission tests of geographic, economic and historic relationship in connection with the various bays on the California coast so as to determine whether or not those bays were inland.

Interpretation of the term "seaward limit of inland waters", as the term is used in the Submerged Lands Act, would appear equally complex. The Act antedated the acceptance of the twenty-four mile rule by five years. Interpretation of the Act in accordance with the "general law" would result in a quagmire of case by case decisions, dependent upon the application of the "general law" to specific water areas.

Fortunately, it is not necessary for the Court to indulge in such a complex system of analysis in reference

to Monterey Bay. The general relationships which defined inland waters have now been reduced to objective terms. Specifically, the general terms of relationship for inland waters within bays have been reduced to a twenty-four mile closing line formula by which these relationships may be tested.

It is true that the twenty-four mile rule was not established until one hundred years after California's admission and five years after the adoption of the Submerged Lands Act. In view of the nature of the twenty-four mile rule, however, chronology of adoption is of no relevance. The twenty-four mile rule is, obviously, a "new" rule, but it is a new *interpretive* rule. The principles which the rule express have not changed.[19] Since the rule is expressive of principles of law which were incorporated within the California Act of Admission and the Submerged Lands Act, the rule may be used to clarify those principles in connection with the Act.

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[19] It is significant that the Executive Branch initially recognized that the adoption of the rule was a clarification rather than a modification of international law. In a memorandum submitted by Under-Secretary of State Dillon to President Eisenhower in 1959, the Under-Secretary commented on Article 7 as follows:

> "Prior to the decision of the International Court of Justice in the *Norwegian Fisheries* case, the United States and other important maritime countries had regarded the 10-mile closing line rule as established international law. *The Court's holding that this rule was not sufficiently established left the true legal situation in doubt. Adoption of article 7 will remove that uncertainty.*" (Italics underscored) (Emphasis added) Message from the President of the United States Transmitting Four Conventions on the Law of the Sea and an Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Executives J to N, Incl., (Senate), 86th Cong., 1st Sess. 1959.

An example from domestic law may tend to clarify this analysis. In *United States* v. *Utah*, 283 U.S. 64 (1931), this Court determined that Utah was entitled to all lands underlying navigable waters *as of the date of the State's admission to the Union.* Navigable, of course, has been interpreted by this Court to mean navigable in fact, requiring the same case by case analysis previously required by the general doctrines defining inland waters. However, if this Court, in a future decision, determines that navigable in fact actually means streams of a certain minimum length or depth, could there be any serious question that title to land under all streams in Utah which were of the required depth or length at the time of Utah's admission would be vested in the state, even though the term "navigable" had not received an objective definition until after the admission of the state?[20] The result of such a hypothetical decision would be the reduction of a subjective principle to an objective standard. The principle would not change—it would simply be expressed in another form.

A similar situation exists in reference to the twenty-four mile rule. The principles which define inland waters under international law have recently been reduced to an objective standard. That standard is a means of interpreting the principles as they were

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[20] This principle of retroactivity is even more graphically expressed by reference to a judicial decision overruling a past decision of the same court. "The effect of the subsequent decision is not to make a new law, but only to hold that the law always meant what the court now says it means." *Fleming* v. *Fleming*, 264 U.S. 29, 31 (1924); and see *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 450-4 (1924); *Sunray Oil Co.* v. *Comm. of Internal Revenue* (10th Cir. 1944), 147 F.2d 962; cert den., 325 U.S. 861 (1945); *Ruppert* v. *Ruppert* (D.C. Cir. 1942), 134 F.2d 497, 500.

utilized in the past. Since the principles defining inland waters were incorporated in both the Act of Admission and the Submerged Lands Act, the twenty-four mile rule relates back to the same Acts and must be deemed to be incorporated within them.

Therefore, insofar as the determination of inland waters within Monterey Bay are concerned, it makes no difference whether the Act of Admission or the Submerged Lands Act is deemed controlling. Both Acts incorporate the twenty-four mile rule as a means of defining inland waters within bays. Under either Act, therefore, all waters of Monterey Bay are defined as inland waters of the State of California.

V.

INTERPRETATION OF THE SUBMERGED LANDS ACT CONSISTENTLY WITH THE EXECUTIVE POLICY OF THE UNITED STATES AT THE TIME OF ITS ENACMENT STILL RESULTS IN A DEFINITION OF INLAND WATERS IN ACCORDANCE WITH THE TWENTY-FOUR MILE RULE.

In contrast to the analysis herein which utilizes international law as an interpretive aid, the Government, restricting its argument to the Submerged Lands Act, argues that the only relevant source of interpretation of the term "seaward limit of inland waters" in the Act is the policy of the Executive Branch of the United States in 1953. Since, according to the Government, that policy supported a ten mile closing line for bays, the Act must be deemed to incorporate the same standard. We now assume, purely for the purpose of argument, that Executive policy is a relevant interpretive aid. We do so to show that even under such a theory, the results of this case would still be the same.

The basic fallacy of the Government's argument lies in the fact that it refuses to recognize the nature of

the prior actions of the Executive Branch. The Government's argument is predicated on the assumption that State Department policy on inland waters has been a clear cut and independent policy of the United States. The Executive Branch of Government, however, has acted under the clear assumption that the boundaries of the United States are defined, not by it, but by international law.[21] In the exercise of its functions concerning foreign affairs, the State Department has been called upon to make interpretations of that law, but it has never sought to define the boundaries of either a state or the United States outside the framework of that law.

Even a summary review of past United States policy on inland waters will demonstrate that the "policy" of the Executive Branch in reference to the definition of inland waters within bays has been the complete adoption of principles of international law. Since Executive "policy" and international law, are, in reality, the same, the results of interpreting Acts of Congress consistently with either one are obviously identical.

Early in the Nation's development, claims over inland waters were understandably vague. Secretary of State Jefferson, in a letter to the French Secretary Genet, claimed authority over all "landlocked bays" of the United States, without statement as to how those bays were to be defined. AMERICAN STATE PAPERS, FOREIGN RELATIONS, Vol. 1, p. 183. Similarly, the Attorney General upheld a United States claim to all of

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[21] Such an assumption is, of course, consistent with the general rule that acts of the Executive, as well as acts of Congress are presumed to be in accordance with international law. See *McLeod* v. *United States*, 229 U.S. 416 (1913).

Chesapeake Bay, twelve miles in width, without reference to closing lines of any nature. 1 Op. Atty. Gen. 32.

The first precise statement of United States policy on inland waters appears in a letter from Secretary of State Bayard to Secretary of the Treasury Manning of May 28, 1886. 1 MOORE, DIGEST OF INTERNATIONAL LAW, pp. 718-721, (U.S. Br. App. 13a-18a). Referring to the propriety of drawing a baseline between headlands in a bay, the Secretary stated:

> "The headland theory, as it is called, has been uniformly rejected by our Government, as will be seen from the opinions of the Secretaries above referred to."

While rejecting the utilization of any baseline, the Secretary nonetheless recognized the adoption of baselines by other nations, noting:

> "The doctrine is new and has received a proper limit in the convention between France and Great Britain of the 2d of August, 1839, in which it is equally agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width be measured from a straight line drawn from headland to headland."

As the ten mile rule became sanctioned by continued use, the United States eventually adopted the standard in the conduct of its international affairs. Following a pattern suggested by Umpire Bates in *The Washington*, 4 MOORE, INTERNATIONAL ARBITRATIONS, 4332, the Department of State entered into the unratified treaty

of February 15, 1888, Article III of which provided in part:

> "The three marine miles mentioned in Article I of the convention of October 20, 1818 shall be measured seaward from low water mark; but at every bay, creek, harbor, not otherwise specially provided for in this treaty, such three marine miles shall be measured seaward from a straight line drawn across the bay, creek, or harbor, in the part nearest the entrance at the first point where the width does not exceed ten miles." Sen.Misc.Doc. 109, 50th Cong., 1st Sess.

In spite of the fact that the Senate rejected the treaty (19 Cong. Rec., 7768), the State Department apparently remained convinced that a ten mile closing line was proper under international law. Thus, counsel for the United States argued in the Alaska Boundary Arbitration[22] that:

> "It never has been claimed that *under the law of nations* such a line could be drawn from headland to headland a greater distance than ten miles." (7 Alaska Boundary Arbitration, Sen.Doc. 162, 58th Cong., 2d Sess. p. 844) (Emphasis supplied)

The United States supported the ten mile rule until the Geneva Convention in 1958. That support, however, was predicated purely on the assumption that the rule was established in international law. The clearest statement of this proposition is found in a letter from Assistant Secretary Webb, writing to Attorney General McGrath on November 13, 1951 (U.S. Br. App. 6a). The Secretary stated:

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[22] The Arbitration involved the location of the boundary between southern Alaska and Canada, which, in the Anglo-Russian Treaty of 1825, was set at ten leagues inland from the "coast."

> "In the formulation of United States policy with respect to territorial waters and in the determination of the principles applicable to any problem connected therewith, such as the problem of delimiting territorial waters, the Department of State has been and is guided by generally-accepted principles of international law and by the practice of other states in the matter."

The twenty-four mile rule was adopted by the United States under a similar assumption that the rule represents present international law. Thus, in a letter from Secretary Rusk to Attorney General Kennedy of January 15, 1963, the Secretary, after stating United States adherence to the rule, justified that support by stating:

> "It [the 24 mile rule] must be regarded in view of its adoption by a large majority of the states of the world as the best evidence of international law on the subject at the present time." Letter from Dean Rusk to Attorney General Kennedy, January 15, 1963, II INTERNATIONAL LEGAL MATERIALS, No. 3, p. 527, May, 1963.

The Executive "policy", therefore, so heavily relied upon by the United States in this proceeding, was and is nothing more than a complete commitment of that branch of Government to rules of international law defining inland waters within bays. In recognition of that commitment, Executive policy can have no independent significance as an interpretive aid for Congressional Acts. By the State Department's own admission, the only relevant source of interpretation is the source to which the Executive Branch itself turns for purposes of boundary definition. That source is international law.

CONCLUSION

For the foregoing reasons, the Court should overrule the finding of the Special Master that inland waters within bays on the California coast are defined by application of the ten-mile rule. The twenty-four mile rule is presently the accepted rule of interpretation, and according to that rule, all the waters of Monterey Bay are inland. Since a line across the mouth of the Bay marks the "seaward limit of inland waters" the three mile marginal belt which defines California's interest under the Submerged Lands Act should be measured from that line.

Respectfully submitted,

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